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IN THE

Supreme Court of the United States

OCTOBER TERM—1949

No. 691

WILLIAM M. BROWN,

Petitioner,

—v.—

KENNETH C. ROYALL, Secretary of the Army, and EDWARD F. WITSEL, the Adjutant General,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND BRIEF IN SUPPORT THEREOF

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

William M. Brown, petitioner, respectfully prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia, decided October 13, 1949, granting a motion to affirm (R. 113), and the order of the United States Court of Appeals for the District of Columbia denying petitioner's motion for leave to argue and for rehearing, dated January 12, 1950 (R. 117). The Court of Appeals affirmed the order of the District Court for the District of Columbia dismissing the complaint, which prayed for a declaratory judgment

declaring and determining petitioner's rights resulting from a general court-martial; and for further relief setting aside the general order of the court-martial because of lack of jurisdiction and failure of the military authorities to comply with due process of law, and for all other relief incidental to the setting aside of the order of the general court-martial (R. 13).

The instant case emanated from an order of a general court-martial which was convened pursuant to par. 1, S. O. #45, 14 February 1946, Headquarters, Seventh Army, APO 758, U. S. Army (R. 18-20), which tried petitioner without giving him the rights guaranteed and assured him under Article of War 70, now AW 46B (Title 10, U. S. C. A. 1517, as amended), and without affording petitioner a fair opportunity to interview witnesses and to prepare properly his defense, and after improperly designating petitioner's personal counsel to act as investigating officer in order to IMPARTIALLY investigate the matter and report back on the charges and specifications and refer the matter to trial.

Despite petitioner's objections and protestations, respondents compelled petitioner to stand trial in absolute violation of any rights to which he was entitled pursuant to the Articles of War, Army regulations, the rules promulgated by the Judge Advocate General's Corps, the statutes of the United States, and the instructions, rules and regulations promulgated for the issuance of charges and specifications prior to the referral of the same to trial by a general court-martial. As a result of such action, petitioner was denied, as an American citizen, a full, fair and impartial trial on the merits.

Opinions Below

The opinion of the District Court (R. 96-99), is reported at 81 F. Supp. 767. The order and opinion of the United States Court of Appeals for the District of Columbia (R. 113, 117) is reported at F. 2d .

Jurisdiction

The jurisdiction of this Court is invoked under sec. 347 of the Judicial Code & Judiciary (28 U. S. C. A. 347), as amended by the Act of June 25, 1948, c. 646, 62 Stat. 928; Judiciary and Judicial Procedure, Title 28, U. S. C. A. 1254.

Questions Presented

1. Were petitioner's rights violated and abridged when the request for an adjournment, in order to interview witnesses and obtain depositions, was denied?

2. Were petitioner's rights violated and abridged when Command designated petitioner's counsel to act as investigating officer?

3. Were petitioner's rights violated and abridged when Command, through the investigating officer, refused to grant petitioner sufficient time to interview witnesses, obtain depositions and prepare his case for trial?

4. Were petitioner's rights violated and abridged by the lack of action of respondents, in not promptly prosecuting the case as prescribed by the Articles of War and the Manual of Court-Martial, by permitting a period of eight months to elapse between the presentment of the first set

of charges and specifications in June of 1945, and the presentment of the second set of charges and specifications in January of 1946?

5. Could the court-martial take jurisdiction over petitioner and permit the prosecution to produce evidence at the trial which was obtained through an investigating officer who had been retained as petitioner's personal counsel prior to his designation as investigating officer?

6. May petitioner attack the procedure utilized by respondents prior to the trial and demonstrate that said procedure was improper, and abridged and violated every fundamental right that petitioner possessed?

7. May petitioner attack the pre-trial procedure and thereby demonstrate that the court-martial had improperly assumed jurisdiction so that any action which it took was either voidable, or null and void?

8. May the military authorities violate and ignore the provisions of the Articles of War and continue to assert a defense that the civil courts may not inquire into the validity of a court-martial's order?

9. If the original procedure was improper, invalid and contrary to law, was the order of the general court-martial void for lack of due process and the abridgment of petitioner's rights?

10. Where the petitioner is no longer in custody, and there are no physical restraints, may petitioner employ declaratory judgment to obtain a declaration of his rights, as well as attack the court-martial's jurisdiction?

Statement of Facts

All of the matters hereinafter referred to and the subject matter of this suit occurred AFTER the German capitulation and not during the "shooting" war. It was not in the face of the enemy.

Petitioner was a Lieutenant Colonel in the Army of the United States detailed to the American Provisional Military Government in Germany. On or about June 27, 1945, petitioner was examined by the Inspector General concerning the various matters which subsequently became part of the subject matter submitted at the court-martial. These matters principally involved charges of appropriating to his own use certain Reichmarks and of engaging in unlawful currency transactions. At or about the time petitioner was examined by the Inspector General, he conferred with one Major Benjamin B. Taylor, in the confidential relationship of attorney and client. Petitioner related a great many matters in confidence to Major Taylor, and asked his advice. Within a few days after the examination by the Inspector General and the conference with Major Taylor, the latter was appointed Investigating Officer by "Command" to proceed with the investigation of those charges against petitioner pursuant to AW 70 (10 U. S. C. A. 1542).

Petitioner appeared before Major Taylor and was examined. Petitioner asked to have certain witnesses called and to have their depositions taken. Petitioner also requested an adjournment of the hearing so that he could present adequate proof that the charges were groundless. Major Taylor wrongfully refused to grant the adjournment on the ground that the 8th Corps, of which they were both officers, was being deactivated, and Command had "requested" immediate action upon this case.

After the investigation, formal charges were preferred, but no further proceedings were held. Thereafter, peti-

tioner returned to the United States and went to a separation center for processing prior to discharge from the service.

On the 27th day of December, 1945, pursuant to Paragraph 20, Special Order 360, Hq. Fort Dix, State of New Jersey (R. 14-15), the petitioner reverted to inactive status and entered upon his terminal leave. On the 30th day of January, 1946, pursuant to Paragraph 129, Special Order 30, Hq. Fort Dix, State of New Jersey (R. 117), petitioner, over his objection, was recalled to active duty for the sole purpose of subjecting him to the jurisdiction of a general court-martial. Upon reporting to Fort Dix, plaintiff was immediately transported to Heidelberg, Germany, where his request for postponement to obtain witnesses was refused and he was tried, found guilty and dismissed from the Service, together with other penalties. As a result of such judgment, petitioner has been and continues to be denied valuable constitutional rights and other valuable and legal rights and privileges.

At the trial, petitioner was confronted with charges and specifications which were different from those preferred in June, 1945.

Petitioner never had an opportunity to call his witnesses, nor to examine or cross-examine the witness called by the Army in support of the new charges.[1] At the trial, petitioner claimed that he had no opportunity to call his witnesses; and respondents refused to call them, saying that they were no longer available since they were now living in the Russian Zone. Therefore, petitioner was unable to properly present his own defense.

Petitioner pointed out to the court-martial that, because the Investigating Officer refused to examine his witnesses,

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1 See pp. 58-59, Testimony of General Court-Martial—Statement by accused and by Defense Counsel.

and because of the latter's refusal to adjourn the examination for the purpose of calling petitioner's witnesses, petitioner had lost every opportunity to defend himself. It is petitioner's contention, *inter alia*, that he has been irreparably damaged by virtue of the respondents' noncompliance with the requirements of AW 70.

Reasons for Granting the Writ

1. Petitioner's constitutional rights and guarantees were abridged when respondents compelled petitioner's counsel and legal advisor to act as Investigating Officer prior to the referral of the charges and specifications to a general court-martial for trial.

2. The respondents, by failing to comply with AW 70 (now AW 46B), in all respects, lost jurisdiction and could not refer the case involving petitioner to general court-martial for trial.

3. By refusing to grant petitioner an extension of time to interview witnesses and obtain their depositions, respondents violated the Articles of War and the constitutional guarantees to petitioner, and therefore the order of the general court-martial was either voidable, or null and void.

4. Petitioner's rights were abridged and his constitutional guarantees were violated by virtue of the long delay which intervened between the referral of the original charges and specifications in June of 1945, and their subsequent amendment, referral and presentment in January of 1946.

5. Petitioner's case should not have gone to trial until petitioner was granted the opportunity of interviewing

witnesses and obtaining their depositions, since these witnesses were to remain in the Russian Zone of occupation and respondents knew, or should have known, that it would be difficult or impossible to contact these witnesses once American authority in the area had been terminated.

6. By flagrantly violating the canons of ethics for professional conduct of attorneys, and by the directions and orders issued by Command, petitioner's counsel was obliged to violate his oath as an attorney and counsellor at law, and as a result, all proceedings which continued after said counsel acted as Investigating Officer were illegal, invalid, null and void.

7. Cases such as this one, predicated on errors made in the preliminary stages, which result in a denial of due process and which terminate in the issuance of orders that deprive an individual of his constitutional rights and guarantees, and which further deprive an individual of rights granted to him by virtue of service to his country as an officer and soldier, are entitled to more careful scrutiny and care prior to the issuance of an order for a court-martial; and where, as here, errors were made in the preliminary stages, unless they are corrected, they should not be permitted to result in an order of a general court-martial which deprives the accused of his constitutional rights and any other rights granted him by Congress.

WHEREFORE, your petitioner prays for a writ of certiorari to be issued under the seal of this Court, directed to the United States Court of Appeals for the District of Columbia, commanding that court to certify and send to this court a complete transcript of the record and all proceedings in the instant cause, so that this case may be reviewed

and determined by this Court and that the judgment of the United States Court of Appeals for the District of Columbia may be reviewed, and that the petitioner may be granted such other and further relief as may seem just and proper in the premises.

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Summary of Argument

1. Certiorari should issue to settle the question whether Command may direct a person retained as counsel for an accused to surrender his retainer and act as investigating officer in the case which he was retained to defend.

2. Certiorari should issue to settle the question whether an accused may be compelled to go to trial on substantial issues without being given the opportunity to prepare his case, interview his witnesses, and obtain depositions from them.

3. Certiorari should issue to settle the question whether failure to comply with and adhere to the rules and regula-

tions promulgated by the Military Establishment, the Judge Advocate General Corps and the statutes of Congress, has created a jurisdictional bar which prevents a general court-martial from hearing the case and issuing its final determination.

4. Certiorari should issue to determine whether the civil courts may decide whether the preliminary stages prior to court-martial are regular and in accordance with law; and, if they are not, determine whether a court-martial may take jurisdiction over the accused despite the failure of the preliminary procedures to fully comply with rules, regulations and existing law.

5. Certiorari should issue to settle irregularities in procedure prior to actual court-martial.

6. Certiorari should issue so that a determination may be made of the issue whether or not declaratory judgment may be utilized to determine the rights of a person who has been dismissed from the Army by order of court-martial and who is no longer in custody.

7. Certiorari should issue to determine whether petitioner's rights were abridged by virtue of the undue delay that occurred between the preparation and presentment of the first set of charges and specifications in June of 1945, and the preparation and presentment of the second set of charges and specifications in January of 1946.

8. Certiorari should issue to correct the order of the United States Court of Appeals for the District of Columbia in this case, which involves the abridgment of petitioner's constitutional rights.

Argument

William M. Brown, herein referred to as "petitioner," was a Lieutenant Colonel in the Army of the United States, detailed to the American Provisional Government in Germany. Petitioner, prior to the matters involved in this case, had a brilliant record of military service which was beyond reproach. He had served over twenty-seven years in the United States Army. He was a lieutenant in World War I. He served from that time in the organized reserve, rising to the rank of major. He entered World War II and was advanced to the rank of lieutenant colonel and was made military governor of the Weimar area in Germany.

Petitioner was awarded the Bronze Star Medal (U. S.); the Croix de Guerre with Silver Star (France); the Croix Militaire, First Class (Belgium); and four battle-participation stars. At the time petitioner was separated from the Army at Fort Dix, he was sworn in as a member of the reserve at the same rank, lieutenant colonel.

Some time in June of 1945, Colonel Brown was ordered to report to the Inspector General concerning certain matters. After one conference with the Inspector General, no further consultations were held, and petitioner did not hear or receive word from the Inspector General regarding the matters about which they had consulted. These matters subsequently culminated in five charges and specifications which, for these purposes, may be summarized as follows:

That the accused appropriated to his own use and benefit about 96,000 Reichmarks of the value of $9,600.; that he unlawfully disposed of 3½% Treasury Bonds of the Reich having a value of about $1,500.; that he had wrongfully

engaged in currency transactions whereby he had received Allied German marks in exchange for German Reichmarks and that he had wrongfully advised one K. J. Vogler, a civilian, to leave town to avoid arrest.

To all of these charges and specifications he had pleaded not guilty and proclaimed his innocence, while the Court Martial found him guilty on each and every charge and specification except that they reduced the 96,000 Reichmarks having a value of $9,600. to 30,000 Reichmarks, having a value of $3,000. The Reviewing Officer, however, sustained the Court Martial only to the extent of the single charge that the accused had converted to his own use 30,000 Reichmarks of the value of $3,000. and dismissed all the other charges and specifications.

However, prior to his conference with the Inspector General, petitioner consulted with one Major Taylor, an attorney at law, and he discussed his situation with Major Taylor in the confidential relationship of attorney and client. Subsequently, petitioner was directed to appear before an investigating officer regarding certain charges and specifications which had been drawn. Upon appearing before said investigating officer, petitioner discovered that said investigating officer was Major Taylor, the officer whom he had originally consulted as an attorney at law, and to whom many matters had been confided by virtue of the relationship of attorney and client. Petitioner requested Major Taylor to disqualify himself or, in the alternative, to give petitioner sufficient time to interview his witnesses and to obtain depositions from those whom he knew would be unavailable as soon as the Provisional Government left the area. Major Taylor informed petitioner that the 8th Corps, of which he was an officer, was to be deactivated within five days and that Command had requested expeditious handling of the case. Petitioner's requests were therefore denied in full.

After the investigation conference was over, petitioner heard no further word about the case and subsequently, in December of 1945, he was returned to the United States and discharged from the Army, subject to the completion of his terminal leave.

After approximately thirty days' terminal leave had expired, petitioner was directed to return to the Army. Over petitioner's objection, he was compelled to report to Fort Dix, from which post he was flown to Heidelberg, Germany, and there compelled to stand trial on amended charges and amended specifications, about which petitioner had no knowledge and had no opportunity to meet or to defend.

The charges were of a very serious nature. Petitioner was compelled to defend them without proper preparation and without the slightest courtesies, usually granted to an offender accused of committing the most heinous offense. The handling of petitioner's case may be likened, in some respects, to the treatment accorded the Negroes in the Scottsboro case. The Army flagrantly violated every right guaranteed petitioner. In utter disregard of the rules and regulations, Articles of War, and other statutes applicable thereto, this petitioner was cashiered from the service.

ALL OF THE INCIDENTS WHICH OCCURRED IN THIS CASE TOOK PLACE AFTER THE SHOOTING WAR WAS OVER, AND WHEN THE ARMY BECAME AN ARMY OF OCCUPATION RATHER THAN AN ARMY OF DESTRUCTION.

Respondents cannot claim exigencies of a military nature prevented them from according this petitioner the rights guaranteed him by the rules and regulations, Articles of War, and statutes applicable thereto. The sole problem that was involved was the deactivation of a particular corps of troops who were not involved in fluid battle front.

It is important for this honorable Court to know that we do not attack the court-martial proceedings *per se* at this time. The attack is leveled against the preliminary procedures which were so flagrantly violated in utter disregard of rules, regulations and existing law; that this petitioner could not have had a fair trial or a trial on the merits because of the major error committed at the outset of these proceedings.

The error may be likened to the improper drafting of an indictment or the improper empaneling of a Grand Jury. ***For, at the June, 1945 investigation, the very person who had been retained and consulted by petitioner as his counsel was ordered by Command to act as investigating officer.*** This was in absolute contravention of all known rules of propriety, codes of ethics, and all procedures governing the conduct of attorneys. The Court is respectfully referred to the *Military Justice Handbook, Dept. of the Army Pamphlet No. 27-6,* published in July, 1949, which states, at p. 2, sec. 1b, as follows:

> "b. Effect of prior participation in same case. No person who has acted as member, defense counsel, assistant defense counsel, or investigating officer in any case may subsequently act in the same case as a member of the prosecution; no person who has acted as member, trial judge advocate, assistant trial judge advocate, or investigating officer in any case may subsequently act as defense counsel or assistant defense counsel in the same case unless he is expressly requested by the accused (AW 11). Whether counsel for either side have participated previously in any capacity in any case must be shown affirmatively in the record of trial (MCM, App. 5)."

We respectfully maintain that the facts in this case are different from any other case presented to this honorable

Court. In principle, the theory of this case is similar to some heretofore decided by this honorable Court; but because of the great difference in the facts, different principles of law must be applied in resolving the issues which are raised.

May Command direct defense counsel to relinquish his position after being retained and consulted by accused and to assume the position of investigating officer or trial judge advocate? May Command move the case for trial at any time that it wishes; or permit a period in excess of eight months to intervene before bringing the case on for trial? May Command so flagrantly violate the fundamental rights of an individual that it can deny a request for adjournment to prepare a case for trial, PARTICULARLY WHEN COMMAND KNOWS THAT CERTAIN WITNESSES WILL BE IN THE RUSSIAN ZONE OF OCCUPATION AND MAY NEVER BE ACCESSIBLE?

The issues in this case are extremely simple. Were it not for the fact that the judgments of military courts have always been protected from the intervention of civil courts, the questions involved in this matter would have been resolved long ago. It is the preliminary stages of the investigation, which is comparable to arraignment before a magistrate or commissioner, that is involved.

Is the law such, that, because a man is not in custody and the remedy of *habeas corpus* is therefore unavailable to him he may not attack the jurisdiction of a court-martial? In equity and good conscience, there must be some other means to determine whether or not a court-martial has jurisdiction without requiring the petitioner to be in custody.[1] There is no necessity to create an aura of

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1 The District Court held that the only way in which the court-martial's jurisdiction could be attacked is by resort to the writ of *habeas corpus*, and that no other avenue was available.

secrecy or holiness around a general court-martial order. If the preliminary stages were correct, unquestionably the order of the court-martial should stand. But if the preliminary stages were incorrect, then the order of the court-martial must fail, unless those preliminary stages affected solely simple procedural rights. *But in this case, more than simple procedural rights were involved. They were the very right of representation, the right of investigation by an impartial, unbiased investigating officer, the right to interview witnesses, to obtain depositions, and all of the other normal processes incident to preparation for trial.* ALL OF THESE RIGHTS WERE DENIED THIS PETITIONER.

We respectfully refer this Court to the colloquy among the accused, his defense counsel and the court-martial at the time the court-martial hearing was in progress. These matters have been adverted to in the proceeding before the District Court and also in the record on appeal in the United States Court of Appeals for the District of Columbia. At that time, petitioner made the following statement to the court:

> "Accused: Gentlemen of the court, to repeat what I have just said I feel that due to the haste and speed with which the investigation in this matter was conducted in June last, over a period of approximately three days and because of the fact that the 8th Corps headquarters was being deactivated as of June 30th, also due to the speed with which the present proceedings have been prepared and are being prosecuted, I having been allowed only the statutory period of five days in which to prepare anything with reference to this case, to summon any witnesses whatsoever, and due to the fact, particularly, that certain witnesses

whom I deem vital in this matter are not able to be present today, including for example, Lt. Colonel Logan, who could give, if he were present, all the circumstances concerning this last stipulation, also any witnesses, a civilian witness, employed by the Post Office from whom I have a statement here but cannot introduce it because of his absence and whose statement raises serious question about the amount that was removed from the Weimar post office, due to this and many other circumstances I feel that my rights have been seriously impaired and I have asked the defense counsel to prepare a statement which I would respectfully request the court to take into consideration, * * *"

Petitioner's counsel made the following statement:

"Defense: * * * Secondly, the defense desires to put on record at this time certain facts which although they are not facts upon the main issues of the case and therefore are not made in a sworn statement, nevertheless relate to the manner in which the case was investigated and brought to trial. It is felt that the court should be made aware of these facts inasmuch as they have hindered Colonel Brown in preparing his case. First, charges were prepared in a great hurry. The investigation was started on 27 June 1945, and charges were drawn up on 28th June, the Investigating Officer made his investigation on the 30th and indorsed it back to the 8th Corps headquarters on 1 July. The reason for this speed was that 8th Corps was closing on 8 July and there was great pressure to get this done. Because of this pressure and because Lt. Colonel Brown was anxious to co-operate in the investigation he was not fully accorded all the rights and privileges which are normally extended to a person

being investigated, neither on the Inspector General's investigation nor on the investigation by the Investigating Officer who was Major Taylor. Now, when Major Stockman, the Inspector General, questioned Colonel Brown on 27 June it was clearly understood that the investigation would be continued on the next day when Colonel Brown would be permitted to make additional and explanatory statements in that he would be shown all the writings, all the things pertaining to the investigation before everything was completed. This was not done, however, thereby a violation of paragraph 7, AR 20-30 was technically committed. Colonel Brown desired and intended to make further explanatory remarks especially with reference to the purpose for which he was holding this money and with reference to what he had learned recently of the character of this man Vogler. The opportunity to do this upon investigation never came and that very same night that Major Stockman had first interrogated him he went to the 8th Corps headquarters where he talked to the Staff Judge Advocate and the Judge Advocate referred him to the Chief of Staff, who *insisted that charges be preferred immediately.* The first indication that Colonel Brown had that any charges had been prepared was on the 30th, when Major Taylor came and talked to him and said that he was the Investigating Officer and upon the ensuing formal investigation Colonel Brown requested first of all that he be allowed to speak to counsel and second that the investigation be delayed so that he could present additional facts to the Investigating Officer and third that the investigation at least be turned over to some other officer at succeeding headquarters who could have more time to conduct the investigation and who would be more disinterested than Major Taylor was. All

these requests were denied. Colonel Brown was only given an oral resume of what the witnesses would testify. No written statements had been prepared at that time and because Major Taylor stated that he had to have the investigation completed immediately, Colonel Brown waived his right to cross-examine any of those witnesses. Now, secondly, Major Taylor should never have acted as Investigating Officer in this case. He was not an impartial officer as is required by Article of War 70. Two days before this investigation, Colonel Brown had gone to him in a confidential manner, I mean, referring to a confidential communication and had laid all the facts of the case before him and had requested his advice as an attorney to client relationship, then two days later Major Taylor was appointed Investigating Officer and acted as such. Thirdly, from the 30th June 1945 until the 3rd of February of this year [1946] Colonel Brown never heard anything more of the whole case. * * *" (Pp. 58, 59—Transcript of Court-Martial Proceedings. Emphasis supplied.)

We maintain that, by a denial of these rights, petitioner's fundamental guarantees were abridged to such an extent that the court-martial deprived him of his native-born prerogatives, in violation of the Constitution and statutes applicable thereto.

The problems which are presented to this Honorable Court in the case at bar are entirely new. There are no cases or precedents which we may urge in support of our position. This Honorable Court has seen fit to hold that AW 70 is not mandatory, but rather directory.[2] While we

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2 *Henry* v. *Hodges*, 171 F. 2d 401, cert. den. 336 U. S. 968.
Humphrey v. *Smith*, 336 U. S. 695.

respectfully differ with this Honorable Court's conclusion, we respectfully submit that the facts in the cases heretofore decided by this Court are so different from the facts of this case as to warrant further consideration.

This petitioner has been deprived of all the rights to which he would be entitled as a former officer of the Army of the United States. He is deprived of the rights guaranteed by the laws relating to veterans; the right to gainful employment as a civil service employee; and, in many respects, the right of employment by many large companies who place great regard on an honorable discharge from our military establishment.

We maintain that there is substantial Federal question involved. We maintain that there are procedural remedies involved in the case at bar which require clarification by this Honorable Court. Upon this clarification and determination rests the peace of mind of thousands of men in the Armed Services.

Trial before a military tribunal differs from a trial before a civil court as night differs from day. Under the circumstances, we urge upon this Court the right to be heard, and to present argument which will substantiate our position. These rights were denied by the Court of Appeals without granting petitioner the right to be heard on the issues involved.

Surely, in equity and good conscience, there is a remedy which will help this petitioner in returning him to the status he enjoyed prior to the order of the court-martial which dishonorably discharged him. An action for declaratory judgment is, in our opinion, the only method whereby all of petitioner's rights may be resolved in one action.

The issues involved in the case at bar present substantial questions which are new and novel and not covered by

precedents. They involve important questions concerning the meaning and scope of Supreme Court decisions.

The case of *Brown* v. *Hiatt*, 81 F. Supp. 647, aff'd 175 F. 2d 273, and presently before this Court (#359, October Term 1949)[3] in part resembles the case at bar. We maintain that a court-martial is a court of limited jurisdiction and therefore its jurisdiction may be collaterally attacked. Since there is no presumption of jurisdiction, it is open to collateral attack.

> *Collins* v. *McDonald*, 258 U. S. 416, 418, 42 S. Ct. 326, 327, 66 L. Ed. 692;
> *Givens* v. *Zerbst*, 253 U. S. 11, 19, 41 S. Ct. 227, 229, 65 L. Ed. 475;
> *McLaughry* v. *Deming*, 186 U. S. 49, 63, 22 S. Ct. 786, 46 L. Ed. 1049;
> *Runkel* v. *U. S.*, 122 U. S. 543, 556.

We respectfully maintain that we can accomplish a collateral attack on jurisdiction through the action of declaratory judgment.

The court-martial denied due process to petitioner by blindly accepting the pre-trial procedures as correct.[4] The wholly improper pre-trial procedures had such a prejudicial effect on petitioner's chances of a fair trial as to convict him before any evidence was put into the record. By hiding behind purely technical matter, respondents desire to maintain an injustice at the cost of petitioner's civil freedom.

The entire effect of denying to petitioner the right to examine his witnesses and to preserve their testimony; to

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3 Reversed March 13, 1950.

4 *Codified Military Injustice*, 35 Cornell Law Quarterly 151, 157-8.

hear the charges by the Government's witnesses and to examine said witnesses; the flagrant disregard of ethical codes whereby petitioner's counsel was compelled to surrender the defense of petitioner's case; the expressed desire of "Command" to "expedite" trial; and the long, unexplained hiatus between the original charges and the amended charges, were so calculated as to prevent petitioner from having a just trial on the merits.

Prejudicial error was committed at the pre-trial procedures.

1. Failure to accord petitioner the right to interview witnesses.

2. Compelling petitioner's counsel to act as investigating officer in flagrant disregard of custom, ethics and Army regulations.

3. Failure to impartially and thoroughly investigate the case.

4. Permitting a great period of time to elapse between presenting the charges and specifications, and the trial.

Von Moltke v. *Gillies*, 332 U. S. 708, MCM 1949, sec. 34(d), p. 27, AW ;
Johnson v. *Zerbst*, 304 U. S. 458;
Reilly v. *Pescor*, 156 F. 2d 632;
Anthony v. *Hunter*, 71 F. Supp. 823;
Hicks v. *Hiatt*, 64 F. Supp.

On the basis of the foregoing, therefore, we urge and it is most respectfully submitted, that the writ of certiorari should issue.

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